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*\*E-FILED - 6/29/10\**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMAI JOHNSON,	)	No. C 02-4632 RMW (PR)
	)	
Petitioner,	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART
vs.	)	RESPONDENT'S MOTION TO
	)	DISMISS AS UNTIMELY;
	)	FURTHER SCHEDULING ORDER
JOHN W. HAVILAND, Warden,	)	
	)	
Respondent.	)	(Docket No. 30)

Petitioner, a California prisoner proceeding pro se, filed a third amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his convictions and sentence. Respondent filed a motion to dismiss the petition as untimely. Petitioner filed an opposition and a supplement to add an exhibit to his opposition, and respondent filed a reply. Based upon the papers submitted, the court will GRANT in part and DENY in part respondent's motion to dismiss.

**BACKGROUND<sup>1</sup>**

On March 20, 2000, petitioner was convicted of five counts of assault with a firearm and two counts of possessing drugs for sale. On June 27, 2001, the California Court of Appeal

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<sup>1</sup>The procedural history is not disputed by the parties.

1 affirmed. On September 12, 2001, the California Supreme Court denied a petition for review.  
2 On April 15, 2002, the United States Supreme Court denied a petition for writ of certiorari.

3 On May 3, 2002, petitioner filed a state habeas petition in superior court.<sup>2</sup> On May 20,  
4 2002, the superior court denied the petition. On May 30, 2002, petitioner filed a state habeas  
5 petition in the California Court of Appeal. On June 5, 2002, the California Court of Appeal  
6 denied it. On July 3, 2002, petitioner filed a state habeas petition in California Supreme Court.  
7 On September 5, 2002, prior to receiving an order from the California Supreme Court, petitioner  
8 filed an original federal petition in this action, raising nine claims. On February 19, 2003, the  
9 California Supreme Court denied his state petition.

10 On September 16, 2003, petitioner filed a motion to modify his sentence in superior  
11 court. That motion was denied on September 25, 2003. On October 22, 2003, this court  
12 dismissed several of petitioner's claims in his federal petition for writ of habeas corpus for  
13 failure to state a claim and granted petitioner leave to amend his petition. On November 5, 2003,  
14 petitioner filed a state habeas petition in the California Court of Appeal. On November 20,  
15 2003, petitioner filed his first amended petition in this action, raising eleven claims. A few days  
16 later, the California Court of Appeal denied petitioner's habeas petition on November 24, 2003.  
17 On December 22, 2003, petitioner filed a state habeas petition in California Supreme Court.  
18 California Supreme Court denied it on October 27, 2004.

19 Thereafter, on November 29, 2004, petitioner filed a second amended petition in this  
20 action, adding two claims. On February 5, 2005, petitioner filed another state habeas petition in  
21 California Supreme Court, which was denied on December 21, 2005.

22 On July 24, 2009, petitioner filed the underlying third amended petition.

## 23 **DISCUSSION**

24 Respondent moves to dismiss seven of petitioner's eleven claims in his third amended  
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26 <sup>2</sup> For purposes of all of petitioner's "filing" dates, the court is using the dates petitioner  
27 signed his petitions rather than the courts' file-stamped dates. See Houston v. Lack, 487 U.S.  
28 266, 276 (1988).

1 petition as untimely. Specifically, he argues that even with statutory tolling, seven claims in  
2 petitioner’s third amended petition do not relate back to petitioner’s timely originally filed  
3 petition.

4 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) became  
5 law on April 24, 1996 and imposed for the first time a statute of limitations on petitions for a  
6 writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-  
7 capital state convictions or sentences must be filed within one year of the latest of the date on  
8 which: (1) the judgment became final after the conclusion of direct review or the time passed for  
9 seeking direct review; (2) an impediment to filing an application created by unconstitutional  
10 state action was removed, if such action prevented petitioner from filing; (3) the constitutional  
11 right asserted was recognized by the Supreme Court, if the right was newly recognized by the  
12 Supreme Court and made retroactive to cases on collateral review; or (4) the factual predicate of  
13 the claim could have been discovered through the exercise of due diligence. 28 U.S.C. §  
14 2244(d)(1).

15 Where, as here, the petition challenges a final judgment of the state court, 28 U.S.C. §  
16 2244(d)(1)(A) applies, and the limitations period begins to run from “the date on which the  
17 judgment became final by conclusion of direct review or the expiration of the time for seeking  
18 such review.” *Id.* § 2244(d)(1)(A). Here, the United States Supreme Court denied a petition for  
19 writ of certiorari on April 15, 2002. (Resp. Ex. 2.) The statute of limitations began running the  
20 next day, April 16, 2002. *See Smith v. Duncan*, 297 F.3d 809, 813 (9th Cir. 2002). Petitioner’s  
21 federal habeas petition was due on April 15, 2003. Although petitioner filed his original petition  
22 on September 5, 2002, he filed the operative third amended petition on July 24, 2009. Thus,  
23 absent tolling, the third amended petition is untimely.

24 A. Statutory Tolling

25 Respondent asserts that petitioner is entitled to statutory tolling only from the time  
26 petitioner filed his habeas petition in the superior court through the date the California Court of  
27 Appeal denied his petition. Respondent argues that petitioner is not entitled to tolling for the  
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1 time petitioner was seeking collateral relief in the California Supreme Court because petitioner  
2 “substantially delayed” seeking relief and because the California Supreme Court denied the  
3 petition as untimely. Respondent concludes that the statute of limitations period ended on May  
4 18, 2003.

5 Respondent’s argument is contrary to established federal law.

6 The one-year statute of limitations is tolled under § 2244(d)(2) for the “time during  
7 which a properly filed application for State post-conviction or other collateral review with  
8 respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). For example,  
9 the statute remains tolled for state prisoners during the intervals between the issuance of a  
10 decision in a state collateral proceeding and the filing of a petition seeking the next highest level  
11 of state collateral review. See Nino v. Galaza, 183 F.3d 1003, 1005 (9th Cir. 1999). As applied  
12 to California’s post-conviction procedure, the Supreme Court held that the statute of limitations  
13 is tolled from the time the first state habeas petition is filed until the California Supreme Court  
14 rejects the petitioner’s final collateral challenge. Carey v. Saffold, 536 U.S. 214, 220, 223  
15 (2002).

16 The circumstances under which a state petition will be deemed “pending” for purposes of  
17 § 2244(d)(2) is a question of federal law. Welch v. Carey, 350 F.3d 1079, 1080 (9th Cir. 2003)  
18 (en banc). An application for collateral review is “pending” in state court “as long as the  
19 ordinary state collateral review process is ‘in continuance’ – *i.e.*, ‘until the completion of’ that  
20 process.” Carey, 536 U.S. at 219-20. In other words, until the application has achieved final  
21 resolution through the State’s post-conviction procedures, by definition it remains “pending.”  
22 Id. at 220.

23 In California, the time between a lower court decision and a filing of a new petition in a  
24 higher court is treated as time the petition is “pending” as long as the petitioner did not  
25 “unreasonably delay” in seeking review. Id. at 221-23. Nino concluded that the limitations  
26 period “remains tolled during the intervals between the state court’s disposition of a state habeas  
27 petition and the filing of a petition at the next state appellate level.” Nino, 183 F.3d at 1005.

1 After Carey, this means that a state habeas petition is pending “in the absence of undue delay,”  
2 while a California petitioner “complete[s] a full round of [state] collateral review” all the way to  
3 the California Supreme Court. Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003) (citation  
4 and internal quotations marks omitted). Thus, a federal court must determine whether a  
5 petitioner “delayed ‘unreasonably’ in seeking [higher state court] review.” Carey, 536 U.S. at  
6 225. If so, the application would no longer have been “pending” during the period at issue. Id.

7 If the state court clearly rules that a petitioner’s delay was “unreasonable,” that is the end  
8 of the matter, regardless of whether it also addressed the merits of the claims, or whether its  
9 timeliness ruling was “entangled” with the merits. Id. at 226; see, e.g., Thorson v. Palmer, 479  
10 F.3d 643, 645 (9th Cir. 2007) (denial of petition with citation to In re Robbins, 18 Cal. 4th 770,  
11 780 (1998), which discusses timeliness determinations was clear denial on timeliness grounds  
12 and therefore petition was neither “properly filed” nor “pending”). If the state court does not  
13 clearly rule on a petitioner’s delay, the federal court must evaluate all “relevant circumstances”  
14 and independently determine whether the delay was “unreasonable.” Carey, 536 U.S. at 226.

15 Respondent alleges that the California Supreme Court’s citation to In re Swain, 34 Cal.  
16 2d 300, 304 (1949) indicated the California court rejected the petition on timeliness grounds.  
17 The court disagrees.

18 Here, the California Supreme Court denied petitioner’s petition with citations to In re  
19 Dixon, 41 Cal. 2d 756 (1956), In re Swain, 34 Cal. 2d 300, 304 (1949), and In re Duvall, 9 Cal.  
20 4th 464, 474 (1995).<sup>3</sup> In California, a Swain/Duvall dismissal affords the petitioner the  
21 opportunity to refile an amended pleading that “allege[s] with sufficient particularity the facts  
22 warranting habeas relief.” King v. Roe, 340 F.3d 821, 823 (9th Cir. 2003) (per curiam),  
23 abrogated on other grounds by Evans v. Chavis, 546 U.S. 189 (2006), as recognized by Waldrip

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25 <sup>3</sup> In re Dixon provides that to bring a claim in a state habeas corpus action a petitioner  
26 must first, if possible, have pursued the claims on direct appeal from his or her conviction unless  
27 the claim falls within certain exceptions. See Park v. California, 202 F.3d 1146, 1151 (9th Cir.  
28 2000). In re Duvall provides that a petition must state the grounds for his release with  
particularity and include supporting documentary evidence.

1 v. Hall, 548 F.3d 729 (9th Cir. 2008); see also Gaston v. Palmer, 417 F.3d 1030, 1039 (9th Cir.  
2 2005) (characterizing a denial order based on Swain and Duvall as the equivalent of “the grant of  
3 a demurrer with leave to refile” under California law, namely, “a holding that [the petitioner] has  
4 not pled facts with sufficient particularity”), as modified on other grounds by 447 F.3d 1165 (9th  
5 Cir. 2006).

6 In re Swain can also potentially stand for the proposition that a petition is untimely,  
7 which is what respondent urges this court to conclude. See In re Swain, 34 Cal. 2d at 304  
8 (requiring a petitioner to “allege with particularity the facts upon which he would have a final  
9 judgment overturned and that he fully disclose his reasons for delaying in the presentation of  
10 those facts”). Even with that interpretation, at best, the citation to Swain gives no “*clear*  
11 indication that a particular request for appellate review was timely or untimely.” Chavis, 546  
12 U.S. at 197 (emphasis added). In such cases, “the federal court must decide whether the filing of  
13 the request for state-court appellate review (in state collateral review proceedings) was made  
14 within what California would consider a ‘reasonable time.’” Id.

15 Here, the filing dates of petitioner’s state pleadings do not show unreasonable delay.  
16 Petitioner filed his state habeas petition to the California Supreme Court twenty-seven days after  
17 the California Court of Appeal denied his state habeas petition and less than three months after  
18 the United States Supreme Court denied a petition for writ of certiorari on direct review. In this  
19 case, it appears that petitioner filed his state court habeas petition within a reasonable time, and  
20 when considered in light of the state supreme court’s supplemental citation to Duvall as well as  
21 Ninth Circuit authority indicating the same, the court concludes that the California Supreme  
22 Court cited Swain for the proposition that petitioner did not plead his habeas petition with  
23 sufficient particularity rather than for the proposition that the petition was untimely. Cf. Chavis,  
24 546 U.S. at 201 (recognizing most states provide 30-60 days for the filing of an appeal).

25 Thus, applying the federal law, petitioner’s statute of limitations began running on April  
26 16, 2002, the date after certiorari was denied. Petitioner filed his first state habeas petition in the  
27 superior court on May 3, 2002. At that point, the statute had run for 18 days. Petitioner is  
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1 entitled to statutory tolling from May 3, 2002, the date petitioner filed a state habeas petition in  
2 superior court, through February 19, 2003, the date California Supreme Court denied his state  
3 habeas petition. Petitioner did not file any another state petition until September 16, 2003. By  
4 September 16, 2003, petitioner's statute of limitations had run another 209 days -- from February  
5 20, 2003 through September 16, 2003. At this point, petitioner's statute of limitations had run  
6 for 227 days (18 days + 209 days), leaving 138 days (365 days - 227 days) left to file his federal  
7 petition.

8 On September 16, 2003, petitioner filed a motion to modify his sentence in superior  
9 court. This was denied on September 25, 2003. On November 5, 2003, petitioner filed a habeas  
10 petition in the California Court of Appeal, which was denied on November 24, 2003, with a  
11 citation to Duvall. Just a few days before, on November 20, 2003, petitioner filed his first  
12 amended federal habeas petition. On December 22, 2003, petitioner filed a petition in California  
13 Supreme Court, which was denied on October 27, 2004, with a citation to, *inter alia*, In re  
14 Robbins, 18 Cal. 4th 770, 780 (1998). In re Robbins stands for the proposition that petitioner's  
15 petition is untimely. See Thorson, 479 F.3d at 645. Because an untimely filed state habeas  
16 petition is not "properly filed," it is not entitled to statutory tolling. See Pace v. DiGuglielmo,  
17 544 U.S. 408, 412-13 (2005). Thus, petitioner's statute of limitations began to run again on  
18 November 25, 2003, the day after the California Court of Appeal denied his petition. With 138  
19 days left to file petitioner's petition, his statute of limitations ran on April 11, 2004.

20 Accordingly, petitioner's third amended petition, filed on July 24, 2009, is untimely  
21 unless the claims in petitioner's third amended petition relate-back to any timely filed claims, see  
22 Fed. R. Civ. P. 15(c); Mayle v. Felix, 545 U.S. 644, 659, 662-64 (2005) (allowing new claims to  
23 relate back to timely pending claims if they share a "common core of operative facts").<sup>4</sup>

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26 <sup>4</sup> Although equitable tolling may be available in limited cases, see Pace v. DiGuglielmo,  
27 544 U.S. 408, 418 (2005), there is no argument or indication that petitioner is entitled to  
28 equitable tolling in this case.

1 B. Relation-back

2 Respondent claims that petitioner’s third amended petition only contains four claims out  
3 of eleven that are timely and relate back to the original petition. However, for the reasons that  
4 follow, the court concludes that only three of petitioner’s eleven claims in his third amended  
5 petition are untimely and must be dismissed.

6 Amendments made after AEDPA’s one-year statute of limitations has run relate back to  
7 the date of the original pleading if the original and amended pleadings “‘ar[i]se out of the  
8 conduct, transaction, or occurrence.’” Mayle v. Felix, 545 U.S. 644, 655 (2005) (quoting Fed. R.  
9 Civ. P. 15(c)(2)). “An amended habeas petition . . . does not relate back (and thereby escape  
10 AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that  
11 differ in both time and type from those the original pleading set forth.” Id. at 650 (finding that  
12 new coerced confession claim did not relate back to the original petition that raised only a  
13 factually distinct Confrontation Clause claim). Rather than allow relation back for any new  
14 claim, the court will “allow relation back only when the claims added by amendment arise from  
15 the same core facts as the timely filed claims, and not when the new claims depend upon events  
16 separate in ‘both time and type’ from the originally raised episodes.” Id. at 657.

17 Here, the court must determine whether any of petitioner’s claims in his third amended  
18 petitioner relate back to any of his previously timely filed claims. Petitioner’s first amended  
19 petition completely replaced the original petition, see Sechrest v. Ignacio, 549 F.3d 789, 804 (9th  
20 Cir. 2008), and was timely filed within the AEDPA statute of limitations.<sup>5</sup>

21 The claims raised in petitioner’s first amended petition are as follows: (1) the

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23 <sup>5</sup> Although Rule 15(c) expressly refers to the “original pleading,” petitioner’s original  
24 petition did not give respondent fair notice of his claims because most of petitioner’s claims  
25 were dismissed for failing to state a claim at all. The Rules adopt a flexible pleading policy,  
26 particularly for pro se litigants, and must give fair notice of the claims by stating the factual and  
27 legal elements of each claim in a short, plain, and succinct manner. See Fed. R. Civ. P. 8(a).  
28 The Federal Rules require merely that pleadings “give the defendant fair notice of what the  
29 plaintiff’s claim is and the grounds upon which it rests.” Cf. Baldwin v. County Welcome  
30 Center v. Brown, 466 U.S. 147, 150 n.3 (1984). In light of the purpose of Rule 15(c), the court  
31 declines to read the phrase “original pleading” narrowly to limit it to the originally filed petition.



1 prosecutor's use of peremptory challenges to excuse two African American jurors violates race-  
2 neutral restrictions in jury selection; (2) the trial court erred in sentencing petitioner to the upper  
3 term rather than the mid term for the enhancement; (3) the trial court erred in denying  
4 petitioner's motion pursuant to CA Penal Code § 995 because there was insufficient evidence  
5 presented at the preliminary hearing; (4) the trial court erred in denying petitioner's motion to  
6 introduce evidence of third party culpability; (5) the trial court erred in denying petitioner's  
7 motion to strike gang enhancements and exclude evidence of gang activity and gang expert  
8 testimony; (6) the trial court erred in denying petitioner's motion to exclude the in-court  
9 identification; (7) the trial court erred in denying petitioner's motion for judgment of acquittal;  
10 (8) the trial court refused to give proposed defense jury instructions 2, 3, 4, 5, and 6; (9) the trial  
11 court erred in giving the prosecution's special jury instruction #1; (10) the trial court erroneously  
12 modified CALJIC numbers 9.00, 9.01, and 9.02 and the transferred intent doctrine; and (11) the  
13 trial court erred in denying petitioner's motion for bail pending appeal.

14         The claims raised in petitioner's third amended petition are as follows: (1) petitioner's  
15 right to a jury trial was violated when the trial court imposed illegal sentencing enhancements;  
16 (2) the prosecutor's use of peremptory challenges to excuse two African American jurors  
17 violates race-neutral restrictions in jury selection; (3) the trial court erred in sentencing petitioner  
18 to the upper term rather than the mid term for the enhancement; (4) the trial court erred in  
19 denying petitioner's motion to strike gang enhancements and exclude evidence of gang activity  
20 and gang expert testimony; (5) the trial court erred in denying petitioner's motion to exclude the  
21 in-court identification; (6) the trial court erred in denying petitioner's motion for judgment of  
22 acquittal; (7) the trial court refused to give proposed defense jury instructions 2, 3, 4, 5, and 6;  
23 (8) the trial court erred in giving the prosecution's special jury instruction #1; (9) the trial court  
24 erroneously modified CALJIC numbers 9.00, 9.01, and 9.02 and the transferred intent doctrine;  
25 (10) ineffective assistance of appellate counsel; and (11) insufficient evidence of an ability to  
26 pay restitution.

27         A comparison of the claims in the first amended and third amended petitions

1 demonstrates that claims 2-9 in petitioner's third amended petition relate back to the timely filed  
2 first amended petition because they are "tied to a common core of operative facts." Mayle, 545  
3 U.S. at 659. Conversely, claims 1, 10, and 11 "depend upon separate transactions and do not  
4 share a common core of operative fact." Hebner v. McGrath, 543 F.3d 1133, 1139 (9th Cir.  
5 2008). These claims are clearly "separated in time and type" from the claims in petitioner's  
6 timely first amended petition.

7 Accordingly, the court GRANTS respondent's motion to dismiss in part and dismisses  
8 claims 1, 10, and 11 as untimely. Because the remaining claims "relate back" to timely filed  
9 claims, the court DENIES respondent's motion to dismiss as to those claims and issues a further  
10 scheduling order.

### 11 CONCLUSION

12 Respondent's motion to dismiss the petition (docket no. 30) is GRANTED in part and  
13 DENIED in part. Claims 1, 10, and 11 are DISMISSED as untimely.

14 Respondent shall file with the court and serve on petitioner, within **ninety days** of the  
15 date this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing  
16 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.

17 Respondent shall file with the answer and serve on petitioner a copy of all portions of the  
18 underlying state criminal record that have been transcribed previously and that are relevant to a  
19 determination of the issues presented by the petition. If petitioner wishes to respond to the  
20 answer, he shall do so by filing a traverse with the court and serving it on respondent within  
21 **thirty days** of the date the answer is filed.

22 Alternatively, respondent may file a motion to dismiss on procedural grounds in lieu of  
23 an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing  
24 Section 2254 Cases within **ninety days** of the date this order is filed. If respondent files such a  
25 motion, petitioner shall file with the court and serve on respondent an opposition or statement of  
26 non-opposition within **thirty days** of the date the motion is filed, and respondent **shall** file with  
27 the court and serve on petitioner a reply within **fifteen days** of the date any opposition is filed.

1           It is petitioner's responsibility to prosecute this case. Petitioner is reminded that all  
2 communications with the court must be served on respondent by mailing a true copy of the  
3 document to respondent's counsel. Petitioner must keep the court and all parties informed of any  
4 change of address by filing a separate paper captioned "Notice of Change of Address." He must  
5 comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal  
6 of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

7           This order terminates docket no. 30.

8           IT IS SO ORDERED.

9 Dated: 6/29/10



RONALD M. WHYTE  
United States District Judge